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Shirley We Can Figure This out: The Continued Confusion Surrounding Prescriptive Easement

Ethan B. Clark

SHIRLEY WE CAN FIGURE THIS OUT: THE CONTINUED CONFUSION SURROUNDING PRESCRIPTIVE EASEMENTS

Ethan B. Clark*

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* 2018 J.D. Candidate at the University of South Carolina School of Law.

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I. INTRODUCTION

As Delmar O'Donnell once knowingly opined over a crackling campfire, "you ain't no kind of man if you ain't got land."[1] On February 21, 2005, Bobby Shirley achieved that standing, acquiring a thirty-seven acre tract of land in Kershaw County from his parents.[2] Although this property was landlocked by the property of surrounding owners, there was a dirt road that ran across a neighbor's property and connected the property to Saxon Road.[3] Mr. Shirley's parents had used this road to access the property from 1985 to 2005,[4] and this simple dirt road could be traced back all the way to a 1960 plat.[5] In fact, it was uncontested that Elijah Bennett and his family, who owned the Shirley property from 1947 to 1969, had used this same road as their sole access to the property.[6] At the time that Mr. Shirley acquired title to this property, W.H. Bundy, Jr. owned the neighboring property over which this road ran.[7]

The relationship between Mr. Bundy and Mr. Shirley started well enough. Mr. Shirley, with the permission of Mr. Bundy, even erected a gate at the entrance to the dirt road in order to prevent the public from dumping trash on the surrounding property.[8] However, an incident in which a logging truck hired by Mr. Bundy blocked the entrance to the road led to conflict between the two.[9] On September 12, 2005, Mr. Bundy instructed Mr. Shirley to take down the gate and stop using the road.[10] Mr. Shirley, believing that he had a right to the use of the road, refused to comply, and Mr. Bundy responded by filing an action on March 24, 2009, seeking a court declaration that Mr. Shirley did not have an easement for the use of this road.[11]

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1. O BROTHER, WHERE ART THOU? (Touchstone Pictures 2000).
2. Bundy v. Shirley, 412 S.C. 292, 297, 772 S.E.2d 163, 166 (2015).
3. *Id.* at 297–98, 772 S.E.2d at 166.
4. *Id.* at 298, 772 S.E.2d at 166.
5. *Id.* at 297, 772 S.E.2d at 166.
6. *Id.* at 297–98, 772 S.E.2d at 166.
7. *Id.* at 297, 772 S.E.2d at 166.
8. *Id.* at 298, 772 S.E.2d at 166.
9. *Id.*
10. *Id.*
11. *Id.* at 298, 772 S.E.2d at 167.

Mr. Shirley asserted that during his combined ownership with his parents he acquired an easement by prescription for the use of the dirt road.[12] Alternatively, Mr. Shirley asserted that the Bennett family acquired an easement by prescription for the use of the dirt road and that this easement passed with his property, the dominant estate.[13] The special referee originally held that Mr. Shirley was entitled to use the property due to a prescriptive easement, but the Court of Appeals of South Carolina later reversed this holding.[14] Over six years after the original action was filed, on May 6, 2015, the Supreme Court of South Carolina affirmed the appellate court's reversal.[15] The Supreme Court of South Carolina held that Mr. Shirley and his family's use of the road at issue could not ripen into a prescriptive easement because the use was permissive.[16] However, it was the court's discussion of Mr. Shirley's second argument that sets a dangerous precedent and likely misstates the general law surrounding prescriptive easements. Although the court noted that Mr. Shirley may not have presented the necessary clear and convincing evidence to establish that the Bennett family acquired a prescriptive easement,[17] the court held that Mr. Shirley's claim failed because he presented no evidence regarding the 'continual use' of the easement by the owners of the dominant estate from 1969, when the Bennett family sold the property, to 1985, when Mr. Shirley's parents acquired the property.[18]

Therefore, although the court sought to clarify much of the confusion surrounding prescriptive easements in South Carolina, the court's analysis regarding continual use, tacking, and nonuse creates more questions than it answers. This opinion, now acting as valuable precedent itself, has the potential to have a ripple effect into future analysis of these principles as well as easement principles that would have been more appropriately applied in the court's analysis. This Note examines how the court misapplied these

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12. *See id.* at 304, 772 S.E.2d at 169 ("Shirley claims the Court of Appeals erred in ruling . . . that Bundy's grant of permission to build a gate on the disputed road defeated his claim for a prescriptive easement.").

13. *Id.* at 312, 772 S.E.2d at 174.

14. *Id.* at 297, 772 S.E.2d at 166.

15. *Id.* at 315, 772 S.E.2d at 175.

16. *Id.* at 312, 772 S.E.2d at 174.

17. Note that previously in this case, "the special referee concluded that Shirley proved by a *preponderance of the evidence* that the Bennett family [satisfied the elements of a prescriptive easement]." *Id.* at 299, 772 S.E.2d at 167 (emphasis added). After explicitly adopting a heightened standard of proof, the Supreme Court of South Carolina did not address whether this standard was met, and instead reversed the special referee's finding on the lack of continual use basis. *Id.* at 315, 772 S.E.2d at 175.

18. *Id.* at 314, 772 S.E.2d at 175.

previously settled principles in South Carolina easement law, proposes how the court could have more appropriately analyzed Mr. Shirley's claims, and explores how its failure to do so could have a significant long-term impact on the future of prescriptive easement cases in South Carolina.

II. BACKGROUND

A. What is a Prescriptive Easement?

As a general matter, an easement is "[a]n interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose."[19] The property that receives the benefit of the easement is known as the dominant estate, while the property burdened by it is known as the servient estate.[20] Further, a prescriptive easement is "one created from an open, adverse, and continuous use over a statutory period."[21] Within South Carolina, a claimant was traditionally required to show the following to establish a prescriptive easement: "(1) The continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was adverse, or under claim of right."[22] The court in

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19. *Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (quoting Douglas v. Med. Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)) ("An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed.").

20. *Estate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

21. *Prescriptive Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. Simmons v. Berkeley Elec. Coop. Inc., No. 2013-001477, 2016 WL 6520167, at *3 (S.C. Nov. 2, 2016) (emphasis omitted) (quoting Williamson v. Abbott, 107 S.C. 397, 400–01, 93 S.E. 15, 15–16 (1917)). The court in Simmons held that this standard could be simplified by requiring a claimant to show that "his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." *Id.* at *4. However, this new test was adopted as a means of eliminating confusion surrounding the third traditional element and was in no way intended to change the substance and standards of the first two elements. *Id.* at *3 (citing Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct. App. 2013)) (holding that the Court of Appeals erred in allowing two methods for establishing the third element, but taking no issue with the Court of Appeals holding that a prescriptive easement had been established based on evidence that, "the water main has been used continuously and uninterruptedly for more than twenty years"). Therefore, because the court in *Bundy*, and the majority of South Carolina cases, interpret prescriptive easement claims using the elements of "continued and uninterrupted use or enjoyment of the right for a period of 20 years" and "the identity of the thing enjoyed," this Note will rely on the traditional language of these first two elements for simplicity purposes. *See* Bundy v. Shirley, 412 S.C. 292, 304, 772 S.E.2d 163, 169–79 (2015) (citing Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)) (relying on the traditional elements).

Bundy noted that there has been confusion among both judges and lawyers as to the standard of proof required to satisfy these elements.[23] The court definitively adopted the requirement that these elements must be proven through clear and convincing evidence, rather than a mere preponderance of evidence.[24] Unfortunately, the court further added to the confusion surrounding prescriptive easements in its actual analysis of the elements, specifically, the element of "continued and uninterrupted use or enjoyment of the right for a period of twenty years."[25]

B. *What Constitutes 'Continued and Uninterrupted Use' for the Prescriptive Period?*

It is uncontested that the required prescriptive period in South Carolina is twenty years.[26] Further, "in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant."[27] Therefore, the frequency of use required for a use to be continual will be much less if the claimant only used the easement to access his rural, secondary property than it would be if he used the easement to access his primary residence.[28] Further, this continual use must only be shown for the duration of the twenty-year prescriptive period.[29]

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23. *Bundy*, 412 S.C. at 304, 772 S.E.2d at 170 (noting that prior cases either, "(1) simply outline the elements of a prescriptive easement and identify the claimant as having the burden of proving these elements; or (2) analogize the establishment of a prescriptive easement to that of adverse possession, which requires clear and convincing proof").

24. *Id.* at 305, 772 S.E.2d at 170.

25. *Simmons*, 2016 WL 6520167, at *3.

26. *See, e.g.*, *Bundy*, 412 S.C. at 304, 772 S.E.2d at 169; Paine Gayle Props. v. CSX Transp., 400 S.C. 568, 583, 735 S.E.2d 528, 536 (Ct. App. 2012).

27. Kelley v. Snyder, 396 S.C. 564, 573, 722 S.E.2d 813, 818 (Ct. App. 2012) (quoting Jones v. Daley, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005)).

28. *Compare Jones*, 363 S.C. 310, 609 S.E.2d 597 (involving rural land that the claimant occasionally used for farming and harvesting timber), *with* Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2013) (involving land on which the claimant constructed his primary residence).

29. *Cf. Jones*, 363 S.C. at 318, 722 S.E.2d at 600–01 (citing Cuthbert v. Lawton, 14 S.C.L. 194 (3 McCord 194) (Ct. App. L. & Eq. 1825)) ("We note, however, that under long established principles of South Carolina law, once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription.").

C. *What is Tacking?*

Tacking allows a claimant to add his period of adverse use to the period of adverse use of his predecessor in title in order to satisfy the twenty-year requirement.[30] In order to tack onto the period of use of another, the claimant must have some sort of direct relationship with this predecessor in title. This relationship is known as privity of estate.[31] In other words, a claimant cannot tack his use to the use of a stranger.[32] However, it is only when a party's adverse use of an easement falls short of the twenty-year prescriptive period that tacking becomes an issue.[33]

This distinction is perfectly exemplified in the facts of *Bundy v. Shirley*. Mr. Shirley only owned the dominant estate for a period of just over four years and, therefore, would have to argue that his period of use tacked to his parents' period of use in order to establish the requisite twenty years of use.[34] Alternatively, the Bennett family, who owned the dominant estate from 1947 to 1969, could rely solely on their personal use of the easement to satisfy the twenty year requirement.[35]

D. *How Did the Court in* Bundy *Apply the Principle of Tacking?*

The court held that Mr. Shirley and his parents failed to acquire a prescriptive easement during their ownership because their use was permissive, rather than adverse.[36] Therefore, Mr. Shirley's only remaining claim relied on the notion that the Bennett family acquired a prescriptive easement during its ownership and that this right of use passed with the dominant estate.[37] It was in the analysis of this claim that the court applied the principle of tacking.[38] The court held that because Mr. Shirley presented

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30. *Kelly*, 396 S.C. at 575, 722 S.E.2d at 819. *See also* Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement.").

31. *See Bundy*, 412 S.C. at 313–14, 772 S.E.2d at 175 (quoting JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 5:19 (2015)) ("Although the requirement of privity has been variously defined, the prevailing view is that there must be some relationship whereby the successive users have come into possession under or through their predecessors in interest.").

32. *See* BRUCE & ELY, *supra* note 31, § 5:19.

33. *See, e.g.*, *Kelley*, 396 S.C. at 575, 722 S.E.2d at 819 (providing that a tacking analysis had to be performed where the claimant's use fell just shy of nineteen years).

34. *Bundy*, 412 S.C. at 297–98, 772 S.E.2d at 166.

35. *Id.* at 299, 772 S.E.2d at 166.

36. *Id.* at 312, 772 S.E.2d at 174.

37. *Id.*

38. *Id.*

no evidence that the owners of the dominant estate from 1969 to 1985 continued to use the dirt road, "[Mr.] Shirley could not *tack* the Bennett family's use to establish his prescriptive easement claim."[39] The court reasoned that the lack of evidence pertaining to the use during this period was fatal to Mr. Shirley's claim because, "our case law regarding prescriptive easements has evolved and now refers to and requires 'continual use' for the easement to remain viable to subsequent claimants."[40]

III. ANALYSIS

Much like the proverbial Dutch boy with his finger in the dam, the *Bundy* opinion sought to address an apparent problem, only to have a brand new one arise as a result of its efforts. While the court in *Bundy* finally settled the standard of proof required to establish a prescriptive easement, the court's analysis regarding continual use and tacking misapplies these previously well-settled principles. This misapplication not only creates uncertainty regarding the future application of these particular principles, but also creates the potential for further upheaval with regard to the principles that would have been more appropriately applied in this case.

A. Where Exactly Did the Court Go Wrong in Bundy*?*

Mr. Shirley relied on an 1825 case[41] to assert that once the Bennett family's prescriptive easement "perfected," it could only be defeated by adverse obstruction by the owner of the servient estate for a period of five years.[42] Admittedly, this five-year obstruction period seems inexplicable and appears to have gained little support in subsequent cases.[43] However, the court in *Bundy* elected to explain away this precedent by asserting that, "[i]n the 190 years since the *Cuthbert* decision was issued, our case law regarding prescriptive easements has evolved and now refers to and requires *'continual use'* for the easement to remain viable to subsequent claimants."[44] It is with this assertion that the opinion went awry.

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39. *Id.* at 314, 772 S.E.2d at 175 (emphasis added).
40. *Id.* at 312, 772 S.E.2d at 174.
41. Cuthbert v. Lawton, 14 S.C.L. 194 (3 McCord 194) (Ct. App. L. & Eq. 1825).
42. *Bundy*, 412 S.C. at 312, 772 S.E.2d at 174.
43. *See Cuthbert*, 14 S.C.L. 194 (3 McCord 194) (asserting the five-year obstruction requirement without citing to any authority).
44. *Bundy*, 412 S.C. at 312, 772 S.E.2d at 174 (emphasis added).

1. Where Did This 'Continual Use' Requirement Arise?

A separate and distinct requirement for continual use between claimants appears unprecedented. This seems particularly odd considering it is supposedly the product of 190 years of evolving case law regarding prescriptive easements.[45] In asserting the development of this additional element, the court in *Bundy* relied on the following language:

> [U]nder long established principles of South Carolina law, once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Furthermore, in order to satisfy the *continual use* requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant.[46]

This language does not assert that an additional element of "continual use" is required for the easement to remain viable to subsequent claimants. When the quote is read as a whole, the "continual use" in the second sentence clearly and unequivocally refers to the "twenty years of continuous use" that is discussed in the immediately preceding sentence.[47]

In the *Jones* opinion itself, this second sentence is cited with the following parenthetical, "[The element of continued use] does not require the use thereof every day *for the statutory period* or even on a weekly or monthly basis . . . ."[48] In *Jones*, the claimant was not a South Carolina resident, making her use of a purported easement to access a property sporadic, but numerous nonetheless.[49] The language that the court in *Bundy* cited to was an instruction to the special referee on remand, regarding how to interpret whether Jones's sporadic use for the twenty year prescriptive period was sufficiently continuous to vest into a prescriptive easement.[50] This language is wholly irrelevant in terms of whether continual use must be shown for the easement to remain viable to subsequent users of the road.

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45. *Id.*

46. *Id.* (emphasis added) (quoting Jones v. Daley, 363 S.C. 310, 318, 609 S.E.2d 597, 600–01 (Ct. App. 2005)).

47. *See id.*

48. *Jones*, 363 S.C. at 318, 609 S.E.2d at 600–01 (emphasis added) (quoting JILL GUSTAFSON, 25 AM. JUR. 2D EASEMENTS AND LICENSES § 68 (2016)).

49. *Id.* at 313, 609 S.E.2d at 598.

50. *Id.* at 318, 609 S.E.2d at 600–01.

There is simply no basis for asserting that case law since *Cuthbert* has evolved to create an entirely new element.

2. *How Did the Court Apply This New Continual Use Requirement?*

Having created this unprecedented requirement, the court in *Bundy* focused on the fact that Mr. Shirley did not establish that the owners from 1969 to 1985 continued to use the disputed road adversely and under claim of right.[51] Relying on this fact, the court in *Bundy* ultimately held that, "the Court of Appeals correctly found that Shirley could not *tack* the Bennett family's use to establish his prescriptive easement claim."[52] As discussed above, tacking only becomes an issue where a party's use does not satisfy the twenty-year requirement.[53] Again, the court relied on two very dissimilar cases to articulate its reasoning. *Kelley* involved a claimant who had only used the road at issue for nineteen years[54] and *Morrow* involved a claimant who had only used the road at issue for five years.[55] In both instances, the claimant sought to establish continuous use for a twenty-year period by tacking his or her use to the use of his or her predecessor in title.[56]

As the Restatements succinctly describe tacking, "[p]eriods of prescriptive use may be tacked together *to make up the prescriptive period* if there is a transfer between the prescriptive users of either the *inchoate* servitude or the estate benefited by the *inchoate* servitude."[57] Only when the easement at issue is inchoate, due to an insufficient period of use, does tacking apply.[58] Additionally, such tacking must be between two prescriptive users.[59]

Mr. Shirley did not seek to add his period of use to a period of use of another. In fact, Mr. Shirley's claim with regard to the Bennett family's use is predicated on the notion that Mr. Shirley's personal use was found not to

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51. *Bundy*, 412 S.C. at 314, 772 S.E.2d at 175.
52. *Id.* (emphasis added).
53. *See, e.g.*, Kelley v. Snyder, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct. App. 2012) (providing that a tacking analysis had to be performed where the claimant's use fell just shy of nineteen years).
54. *Id.*
55. Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct. App. 1997).
56. *Kelley*, 396 S.C. at 575, 722 S.E.2d at 819; *Morrow*, 328 S.C. at 529, 492 S.E.2d at 424.
57. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (2000) (emphases added).
58. *Id.*
59. *Id.*

be adverse, or under a claim of right.[60] If his use was permissive it could never ripen into a prescriptive easement, no matter how long the duration.[61] Therefore, there would be no reason to tack to Mr. Shirley's use. Instead, Mr. Shirley's claim was predicated on the notion that the Bennett family's use ripened into a prescriptive easement itself.[62] Once this easement was established, it passed with the dominant estate.[63] Such a claim is not properly addressed by a tacking analysis and cannot be defeated by a lack of continual use.

B. Why Is Any of This Significant?

Even though prescriptive easements can be traced all the way back to English common law,[64] South Carolina courts have continuously struggled with providing a consistent application of the law.[65] Although the opinion in *Bundy* marks a significant step towards consistency in its express adoption of the "clear and convincing" standard of proof,[66] the court then added to the confusion by articulating a new element that appears without basis in centuries of case law. This is just the sort of issue that the Supreme Court of South Carolina recently had to rectify in *Simmons*. In *Simmons*, the court held that "the Court of Appeals erred in recognizing two methods of proving the third element of a prescriptive easement."[67]

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60. Bundy v. Shirley, 412 S.C. 292, 312, 772 S.E.2d 163, 174 (2015).

61. *See* Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (Ct. App. 2012) (quoting Williamson v. Abbott, 107 S.C. 397, 400–01, 93 S.E. 15, 16 (1917)) ("[U]se by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription . . . .").

62. *Cf.* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (2000) (providing that tacking is a principle that only applies with inchoate, or unripened, easements).

63. This argument goes under the assumption that the prescriptive easement established by the Bennett family was appurtenant, which we will address below. JOHN B. MCARTHUR, 12 S.C. JUR. *Easements* § 3 (2016) (footnote omitted) (citing Smith v. Comm'r of Pub. Works, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994)) ("An appurtenant easement runs with the land of the dominant estate although a conveyance of the dominant estate does not expressly mention it.").

64. 12 S.C. JUR. *Easements* § 10 (2016) (footnote omitted) ("The 20-year rule for a prescriptive easement was adopted from the English common law rule.").

65. *See, e.g.*, Simmons v. Berkeley Elec. Coop. Inc., No. 2013-001477, 2016 WL 6520167, at *3 (S.C. Nov. 2, 2016) ("We acknowledge that this Court's decisions have helped give rise to this error and now take this opportunity to clarify the third element of a prescriptive easement."); *Bundy*, 412 S.C. at 304, 772 S.E.2d at 170 ("Although the elements of a prescriptive easement are well-established, the standard of proof as to these elements has given rise to confusion among the bench and bar.").

66. *Bundy*, 412 S.C. at 304, 772 S.E.2d at 170.

67. *Simmons*, 2016 WL 6520167, at *3.

The court gracefully recognized its role in the confusion, tracing the history of this third element which started as, "(3) that it is adverse to the right of some other person"[68] but then became, "(3) that the use or enjoyment was adverse, or under claim of right"[69] before ultimately becoming, "(3) that the use or enjoyment was adverse or under claim of right."[70] The court noted that the second version of the third element, with the comma, was "intended to modify the term 'adverse,' not create another method to establish the claim."[71] However, the subsequent, seemingly inadvertent, omission of this comma created two distinct methods for establishing this third element and resulted in over seventy years of confusion.[72]

Similar to the way the *Williamson* court sought only to modify the third element,[73] the reference to "continual use" in *Jones* was clearly meant only to clarify the sort of use that would constitute continuous use within the first element of prescriptive easements.[74] As Justice Cardozo noted, "[t]he half-truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten."[75] The "continual use" requirement introduced in *Bundy* is simply the result of "continuous use over a statutory period" being stripped of the qualification that it need only be shown "over the statutory period."

The true confusion resulting from this new requirement arises in the application of previously well-settled easement principles. By failing to analyze Mr. Shirley's claim under these principles, practitioners and lower courts will be forced to speculate regarding the extent to which these principles still apply and how they should work in conjunction with the continual use requirement.

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68. *Id.* (citing Lawton v. Rivers, 13 S.C.L. 445, 451 (2 McCord) (1823)).

69. *Id.* (citing Williamson v. Abbott, 107 S.C. 397, 400–01, 93 S.E. 15, 16 (1917)).

70. *Id.* at n.3 (citing Steele v. Williams, 204 S.C. 124, 133, 28 S.E.2d 644, 648 (1944)).

71. *Id.* at *3 (footnote omitted).

72. *But see id.* (stating that the Court did "not [intend to] create another method to establish a claim").

73. *Williamson*, 107 S.C. at 400, 93 S.E. at 15–16.

74. *See* Jones v. Daley, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005).

75. Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown, 246 N.Y. 369, 373, 159 N.E. 173, 173 (1927).

C. *How Could the Court in* Bundy *Have More Appropriately Analyzed Mr. Shirley's Second Claim?*

Although the court in *Bundy* noted that Mr. Shirley might have presented insufficient evidence to establish that the Bennett family acquired a prescriptive easement during its period of ownership, the court ultimately elected to hold that Mr. Shirley did not have a prescriptive easement on other grounds.[76] Operating under this same assumption, that the Bennetts acquired a prescriptive easement, the analysis of whether this easement passed to Mr. Shirley must begin with the time when this right vested or ripened.[77] In South Carolina, "[t]he general rule appears to be that, absent termination due to circumstances such as abandonment, estoppel, end of necessity, merger, release, or prescription by the servient tenement, an appurtenant easement and an easement in gross of a commercial character are perpetual and irrevocable."[78]

1. *Was the Bennett Family's Prescriptive Easement Appurtenant or In Gross?*[79]

All easements can be classified as either "appurtenant" or "in gross."[80] In South Carolina, to classify as an appurtenant easement, the easement "must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof."[81] Appurtenant easements inhere in the land and pass with the dominant estate.[82] However, an easement in gross is "a mere personal privilege to the owner of the land and incapable of transfer by him, and is not, therefore assignable or inheritable."[83] In *Bundy*, this distinction is critical in that if the Bennett family acquired an easement in gross, the

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76. *Bundy*, 412 S.C. at 314, 772 S.E.2d at 175.

77. This would have to have been at some time between 1967 and 1969, after the Bennett family would have had the opportunity to have used the disputed road for twenty years, but before the Bennett family conveyed the property to another individual.

78. 12 S.C. JUR. *Easements* § 29 (2016).

79. Since there was no mention within the record that Mr. Shirley or any of his predecessors in title used the property for commercial purposes, there is no need to discuss the unique exception for easements in gross for a commercial character.

80. Tupper v. Dorchester Cty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965); Brasington v. Williams, 143 S.C. 223, 141 S.E. 375, 382 (1927).

81. *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806.

82. *Id.*

83. *Id.* (citing Steele v. Williams, 204 S.C. 124, 124, 28 S.E.2d 644, 646 (1944); *Brasington*, 143 S.C. at 223, 141 S.E. at 382).

easement likely could not be assigned to a subsequent owner of the property.[84] However, if it were deemed an appurtenant easement, it would run with the dominant estate, which ultimately ended up in the possession of Mr. Shirley.

South Carolina purports to follow the majority rule that, "[e]asements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate."[85] Despite this express preference for appurtenant easements, South Carolina courts are very strict in requiring that all of the elements of an appurtenant easement must be shown, including that the easement has a terminus on the dominant estate and that the easement is essentially necessary.[86] Although a grantor's intent will be given effect so long as it does not contravene any settled rule or public policy,[87] prescriptive easements present a unique situation in which there is no deed or other document that expressly creates the easement.[88] Therefore, the analysis of

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84. Though it is possible to create an easement in gross that is assignable, courts will typically look to the language creating the easement to determine whether that was the intent of the parties. *See, e.g.*, Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 382, 635 S.E.2d 538, 541 (2006) (citing *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806). In *Bundy*, this would present two major hurdles: (1) there was no document granting the easement to evidence the intent of the parties; and (2) the opinion does not mention that Mr. Shirley has presented any evidence of such assignments. Bundy v. Shirley, 412 S.C. 292, 299, 772 S.E.2d 163, 167 (2015).

85. Rhett v. Gray, 401 S.C. 478, 492, 736 S.E.2d 873, 880 (Ct. App. 2013) (quoting Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994)); *see also* BRUCE & ELY, *supra* note 31, § 2:3, at n.12 ("There is a constructional preference for easements appurtenant over easements in gross. In fact, the rule that an easement should be presumed appurtenant is often characterized as strong.").

86. *See, e.g.*, Tupper v. Dorchester Cty., 326 S.C. 318, 325–26, 487 S.E.2d 187, 191 (1997) (citing MCARTHUR, *supra* note 63, § 3, at 1) ("Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross."); see also BRUCE & ELY, *supra* note 31, § 2:3, at n.12 (citing *Tupper*, 326 S.C. at 326, 487 S.E.2d at 191) ("In contrast [to the presumption that an easement is appurtenant], the Supreme Court of South Carolina has taken the position that an appurtenant easement must be 'essentially necessary' to the enjoyment of a dominant estate, and that an easement will be treated as one in gross unless this element can be shown.").

87. Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009) (quoting Wayburn v. Smith, 270 S.C. 38, 41–42, 239 S.E.2d 890, 892 (1977)).

88. *See* Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 419–20, 633 S.E.2d 136, 141 (2006) (citing Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 919 (1973) ("A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner; however, easements by prior use and by necessity are implied by law."); MCARTHUR, *supra* note 63, § 3 ("A prescriptive easement arises not from an express grant or reservation or by implication, but is established by conduct of the owner of the dominant tenement contrary to the fee simple interest of the owner of the servient tenement."); GUSTAFSON, *supra* note 48, §§ 22, 30 ("A prescriptive easement is not implied by law but is

whether a prescriptive easement is appurtenant or in gross must begin with an evaluation of whether the conduct of the owner of the dominant estate established the necessary elements for an appurtenant easement.[89]

It should be noted that South Carolina courts have never directly analyzed whether a prescriptive easement is appurtenant or in gross. However, the court in *Rhett* provided that, "where the owner of a right of way appurtenant to a certain tract uses it for the period of prescription as appurtenant also to another tract, he gains a prescriptive right to such enlarged use."[90] Thus the court has noted that prescriptive use may be used in a manner appurtenant to a particular tract. Further, numerous surrounding jurisdictions have been willing to recognize a prescriptive easement as appurtenant.[91] Assuming that a prescriptive easement satisfies each element required for an appurtenant easement, case law would suggest that a court will never interpret the easement as personal or in gross.[92] Further, in South Carolina, an appurtenant easement passes with the dominant estate regardless of whether it was mentioned in the deed.[93]

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established by the conduct of the dominant tenement owner; however, easements by prior use and by necessity are implied by law.").

89. BRUCE & ELY, *supra* note 31, § 2.3 ("Implied easements rest on a showing that they are necessary for the utilization of a dominant estate, so they are invariably appurtenant to the claimant's parcel.").

90. Rhett v. Gray, 401 S.C. 478, 496, 736 S.E.2d 873, 883 (quoting Ogle v. Trotter, 495 S.W.2d 558, 566 (Tenn. Ct. App. 1973)).

91. *See, e.g.*, Andrews v. Hatten, 794 So.2d 1184, 1188 (Ala. Civ. App. 2001); Boccanfuso v. Conner, 89 Conn. App. 260, 268, 873 A.2d 208, 216 (2005); Deans v. Mansfield, 210 N.C. App. 222, 229, 707 S.E.2d 658, 664 (2011); Shrewsbury v. Humphrey, 183 W. Va. 291, 295, 395 S.E.2d 535, 539 (1990); *see generally* BRUCE & ELY, *supra* note 31, § 2.3 ("Implied easements rest on a showing that they are necessary for the utilization of a dominant estate, so they are invariably appurtenant to the claimant's parcel."); ERIC M. LARSON, 42 CAUSES OF ACTION 2D 111 (2009) (citing Oshita v. Hill, 65 N.C.App. 326, 308 S.E.2d 923 (1983)) ("If an appurtenant prescriptive easement came into being while the benefited tract was owned by the predecessor in interest of the current owner, the current owner may have standing to claim prescriptive rights without showing that he or she made regular use of the claimed easement.").

92. *Rhett*, 401 S.C. at 492, 736 S.E.2d at 880 (quoting Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994)).

93. BRUCE & ELY, *supra* note 31, § 9:1 at n.3 (citing Tupper v. Dorchester Cty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965); *Smith*, 312 S.C. at 467–68, 441 S.E.2d at 336) ("Unless limited by the terms of creation or transfer, appurtenant easements follow ownership of the dominant estate through successive transfers.").

a. Did the Disputed Road Inhere in the Land and Concern the Premises?

When evaluating claims involving appurtenant easements, courts have repeatedly recited that such easements must inhere in the land and concern the premises, but have never directly addressed what is required to satisfy these two elements.[94] In several cases, South Carolina courts have held that roadways used for the purposes of ingress and egress to the dominant estate classify as appurtenant easements.[95] Based on South Carolina's presumption that an easement will be deemed in gross unless each element of an appurtenant easement is satisfied,[96] it can be reasonably inferred that a roadway across the servient estate for the purposes of ingress and egress to the dominant estate must inhere in the land and concern the premises.

The disputed road in *Bundy* was for the limited purpose of ingress and egress to Mr. Shirley's property.[97] Therefore, like the easements in both *Smith* and *Proctor*, it is one that both inheres in the land and concerns the premises.

b. Did the Disputed Road Have a Terminus on Mr. Shirley's Property?

Put simply, this element requires that an easement come to an endpoint on the dominant estate. Alleyways between the two estates provide the perfect illustration of what this element requires.[98] In *Steele*, the plaintiff

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94. *See, e.g.*, Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009) (citing *Tupper*, 326 S.C. at 325–26, 487 S.E.2d at 191)); Carolina Land Co. v. Bland, 265 S.C. 98, 106, 217 S.E.2d 16, 20 (1975) (citing *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806); Brasington v. Williams, 143 S.C. 223, 141 S.E. 375, 382 (1927)).

95. *See, e.g.*, *Smith*, 312 S.C. at 469, 441 S.E.2d at 337 (holding that the owner of the dominant estate had an appurtenant easement across the servient estate for ingress and egress to a canal); Proctor v. Steedley, 398 S.C. 561, 574, 730 S.E.2d 357, 364 (Ct. App. 2012) (affirming the special referee's holding that an easement for an access road across the servient estate was an appurtenant easement).

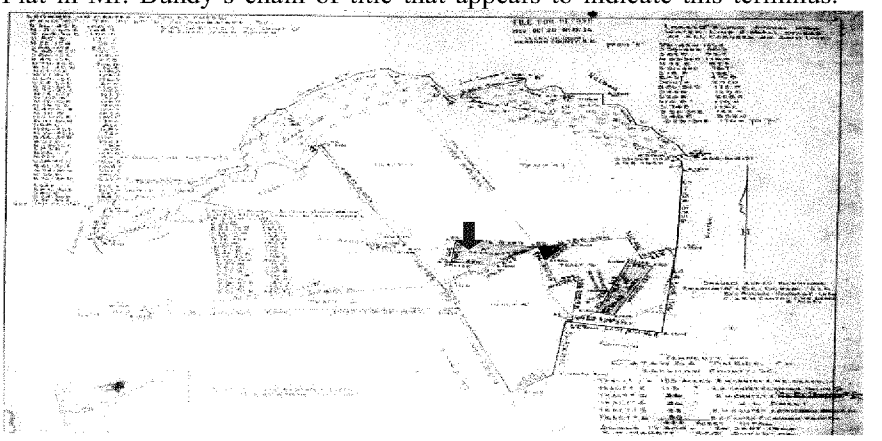
96. *Tupper*, 326 S.C. at 325–26, 487 S.E.2d at 191 (citing MCARTHUR, *supra* note 63, § 3(c)) ("Unless an easement has all the elements necessary to be an appurtenant easement . . . it will be characterized as a mere easement in gross.").

97. Bundy v. Shirley, 412 S.C. 292, 298, 772 S.E.2d 163, 166 (2015).

98. *See, e.g.*, Shia v. Pendergrass, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952) (holding that, where the claimant sought to establish an appurtenant easement over an alleyway, "[t]he evidence fails to establish that the alleged right of way has a terminus on respondent's lot, and the absence of a terminus on his property is fatal to his claim to an appurtenant easement"); Steele v. Williams, 204 S.C. 124, 133, 28 S.E.2d 644, 647 (1944) (holding that an easement for use of an alleyway could not be appurtenant due to lack of termini).

sought to establish an appurtenant easement for the use of an alleyway that ran between his building and another.[99] However, the court refused to interpret this easement as appurtenant, regardless of the apparent intent of the parties, because the easement had two termini on two public roadways rather than on the dominant estate.[100] Similarly, the Court of Appeals of South Carolina held that an easement could not be appurtenant, for lack of a terminus on the land of the party claiming it, where the easement at issue was granted in favor of an individual who was not the owner of the dominant estate.[101] Presumably, an easement could also fail for lack of terminus where the easement traverses the dominate estate before terminating on a neighboring property.[102]

None of those scenarios appear to be present regarding the disputed road in *Bundy*. Instead, Mr. Shirley's amended answer and counterclaim expressly provided that the disputed road ultimately terminated on Mr. Shirley's property.[103] This was further evidenced by the duly recorded 1960 Plat in Mr. Bundy's chain of title that appears to indicate this terminus.[104]



99. *Steele*, 204 S.C. at 124, 28 S.E.2d at 645.

100. *Id.* at 124, 28 S.E.2d at 647.

101. Springob v. Farrar, 334 S.C. 585, 589, 514 S.E.2d 135, 143 (Ct. App. 1999).

102. Whaley v. Stevens, 21 S.C. 221, 224 (1884) (holding that an appurtenant easement cannot exist where "the plaintiff owns the middle of the road").

103. Amended Answer & Counterclaim at 2, Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015) (No. 2009-CP-28-00338), 2010 WL 10933679, at ¶ 6.

104. *Id.*

c. Was the Use of the Disputed Road Essentially Necessary to the Enjoyment of the Dominant Estate?

In *Proctor*, the court held that an access road was essentially necessary to the enjoyment of the dominant estate where the dominant estate was bisected by a creek with deep ravines on either side and the access road across the servient estate was the only reasonable means to access the northern portion of the property.[105] Although the owner of the dominant estate testified that a bridge could be built over the creek, the court held that there was nothing in the record to indicate that this option was either reasonable or affordable.[106]

Conversely, in *Windham*, the court held that it was questionable whether an easement for access to a pond for irrigation was essentially necessary when the dominant estate was bordered by a river that provided a reasonable alternative for irrigation.[107] Similar to *Windham*, the court in *Tupper* held that there was a genuine issue of material fact as to whether an easement was essentially necessary to the enjoyment of the claimants' estate where the claimants asserted that they had no means of access to their property other than via the easement, but testimony at a hearing showed that alternative routes were merely inconvenient.[108]

Based on the record of the case, it appears that Mr. Shirley acquired the exact same estate as possessed by the Bennett family, no more and no less.[109] Assuming that the Bennett family used the disputed road as a means of ingress and egress for its landlocked property, it would be difficult to contend that this easement was not essentially necessary for the family's enjoyment of the estate. The record does not indicate any reasonable alternative means of ingress and egress to the property. Depriving the owner of the dominant estate the right to use this easement would effectively eliminate the owner's ability to enjoy the property.

An argument could be made that the Bennett family could have sought a path through another neighboring property. However, like the notion of building a bridge over the creek in *Proctor*, there is nothing to indicate that

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105. Proctor v. Steedley, 398 S.C. 561, 575, 730 S.E.2d 357, 364 (Ct. App. 2012).

106. *Id.* at 575, 730 S.E.2d at 365.

107. Windham v. Riddle, 381 S.C. 192, 204, 672 S.E.2d 578, 584 (2009).

108. Tupper v. Dorchester Cty., 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997); *see also* Steele v. Williams, 204 S.C. 124, 131, 28 S.E.2d 644, 647 (1944) (holding that an easement for ingress and egress was not essentially necessary when the dominant estate had seventy feet of frontage on a public, paved street).

109. Amended Answer & Counterclaim at 1–3, Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015) (No. 2009-CP-28-00338), 2010 WL 10933679, at ¶ 1–18.

such an option would be either affordable or reasonable. Further, there are no South Carolina cases that have held that seeking an easement or right of way across a different neighbor's property is a reasonable alternative. Ultimately, whether the option to negotiate a right of way with a third party makes an easement not essentially necessary is an unsettled issue.

d. Why Did the Court Not Address This in Gross Versus Appurtenant Analysis?

Based on the facts provided in the opinions and public record, there appears to be sufficient evidence to find that the Bennett family obtained an appurtenant easement through prescription. Admittedly, the record is somewhat limited due to the fact that Mr. Shirley did not appear to raise the appurtenant easement argument beyond his amended answer and counterclaim.[110]

Mr. Shirley, in his amended answer and counterclaim, asserted that, "Defendant enjoys a private permanent easement appurtenant for ingress and egress and utilities from the Defendant's property to the terminus of Saxon Road. [sic] such private easement appurtenant being established as an easement by prescription as set forth above."[111] Despite specifically pleading this defense, there is absolutely no mention of easements in gross versus appurtenant easements within any of the three *Bundy* opinions.[112] Based on the detailed Supreme Court of South Carolina opinion, it appears highly likely that Mr. Shirley abandoned this argument and chose to more directly rely on the *Cuthbert* opinion to assert that once a prescriptive easement is perfected, it "could only be defeated by an adverse and continued obstruction for five years."[113]

This would have been a perfect opportunity for the court to explain that 190 years of easement case law has developed the requirement that an easement must qualify as appurtenant in order for it to run with the dominant estate and that such easements may still be terminated in a variety of ways, beyond mere adverse and continued obstruction. Since South Carolina will

110. Amended Answer and Counterclaim at 5, Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015) (No. 2009-CP-28-00338), 2010 WL 10933679, at ¶ 32.

111. *Id.*

112. *See* Bundy v. Shirley, 412 S.C. 292, 298, 772 S.E.2d 163, 166 (2015); Bundy v. Shirley, No. 2013-UP-153, 2013 WL 8507861 (S.C. Ct. App. May 8, 2013), *aff'd as modified*, 412 S.C. 292, 772 S.E.2d 163 (2015); Bundy v. Shirley, No. 2009-CP-28-0338 (S.C. Com. Pl. 2011), 2011 WL 11740811.

113. *Bundy*, 412 S.C. at 312, 772 S.E.2d at 174 (quoting Cuthbert v. Lawton, 14 S.C.L. 194, 3 McCord 194 (Ct. App. 1825).

find an easement to be in gross unless all of the essential elements of an appurtenant easement are shown,[114] Mr. Shirley's failure to argue and present evidence pertaining to these elements could still have been fatal to his claim. However, assuming that the Bennett family created an appurtenant easement through its use, this easement would be perpetual and irrevocable unless some specific circumstance caused its termination.[115]

2. *Did the Bennett Family's Prescriptive Easement Terminate Prior to the Shirley's Acquiring Title?*

In South Carolina, there are generally seven ways in which an easement may be terminated: (1) abandonment, (2) estoppel, (3) end of necessity, (4) merger, (5) release, (6) expiration, and (7) prescription by the servient tenement.[116] Estoppel is irrelevant since there was no evidence of Mr. Bundy detrimentally relying on assertions made by Mr. Shirley or his predecessors in title.[117] End of necessity can only terminate an easement of necessity, not a prescriptive easement.[118] There is no evidence that the Bennett family or any subsequent owner of Mr. Shirley's estate also owned Mr. Bundy's servient estate such that merger would have applied.[119] Although Mr. Shirley, or one of his predecessors in title, could have expressly released his claim to the easement, no such evidence was presented.[120] An easement can only terminate through expiration if it was created for a specific term or until

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114. 12 S.C. JUR. *Easements* § 3.

115. *See* 12 S.C. JUR. *Easements* § 29.

116. *Id.* ("[A]bsent termination due to circumstances such as abandonment, estoppel, end of necessity, merger, release, or prescription by the servient tenement, an appurtenant easement and an easement in gross of a commercial character are perpetual and irrevocable.").

117. *See* Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015); Boyd v. BellSouthTel. Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006) ("The essential elements of equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts.").

118. *Boyd*, 369 S.C. at 422, 633 S.E.2d at 142 (citing GUSTAFSON, *supra* note 48, §§ 29, 35) ("An easement implied by prior use will not be extinguished if the easement is no longer necessary, but an easement by necessity will not be extinguished once the necessity ends.").

119. *See Bundy*, 412 S.C. at 292, 772 S.E.2d at 163 (2015); *see generally* Pearce v. McClenaghan, 39 S.C.L 178, 5 Rich. 178 (Ct. App. 1851).

120. *See Bundy*, 412 S.C. at 292, 772 S.E.2d at 163; Witt v. Poole, 182 S.C. 110, 188 S.E. 496, 498 (1936) (citing 19 C.J.S. Easements § 153) ("It seems to be settled that a cesser of the use, coupled with any act clearly indicative of an intention to abandon the rights, will have the same effect as an express release of the easement without any reference whatever to time, which is not a necessary elements in the question of abandonment.").

the happening of a particular event, but there is no evidence of such a limit being placed on the disputed dirt road.[121] Based on the facts provided in the opinion, there are only two possible methods through which the easement could have terminated during the period from 1969 to 1985: (1) prescription by the owner of the servient estate or (2) abandonment.

a. What is Required to Establish Termination of an Easement by Prescription by the Owner of the Servient Estate?

There appear to be only two South Carolina cases that address termination of an easement by the prescriptive use of the servient estate owner.[122] Both of these cases rely on the adverse possession statute to assert that ten years of adverse possession of the easement will act to terminate it.[123] Not insignificantly, this adverse possession previously required five years of adverse possession in order to divest title.[124] Recall that the court in *Bundy* "question[ed] the propriety of *Cuthbert* because the case inexplicably requires a five-year period of adverse and continued obstruction to defeat an established prescriptive easement."[125]

While adverse possession and prescriptive easements are analagous in many ways,[126] key distinctions prevent the two concepts from being applied interchangeably. As noted in *Bundy*, "adverse possession operates to *divest title* to the land at issue whereas the rights of prescriptive easements in land are measured *by the use* made of the land giving rise to the easement."[127] Since the owner of the dominant estate does not hold title to the land over

121. *See generally* 12 S.C. JUR. *Easements* § 29 ("Any easement may, by the terms of the express or implied grant, however, be made for a specific term only or be made terminable upon a specific event.").

122. State v. Pettis, 41 S.C.L. 390, 7 Rich. 390 (Ct. App. 1854) ("[A]n easement, founded either in express grant, or depending for its existence upon evidence of prescription, may be lost or extinguished by a tortious interruption of its exercise by the owner of the soil charged with such easement, provided such interruption be continued for a sufficient length of time to legalize the right under the statute of limitations."); Bowen v. Team, 40 S.C.L. 298, 6 Rich. 298 (Ct. App. 1853) ("I hold that ten years adverse possession of land is a conveyance of the fee resting in the owner thus barred, and that ten years adverse possession of an easement, (a way,) by the owner of the soil, operates as a release to him of the right.").

123. State v. Pettis, 41 S.C.L 390, 7 Rich. 390 (Ct. App. 1854); 12 S.C. JUR. Easements § 33 (citing S.C. CODE ANN. §§ 15-67-210–260 (2012)) ("Prescription may be based on the 10-year adverse possession statute of limitations.").

124. Brock v. Kirkpatrick, 69 S.C. 231, 48 S.E. 72, 80 (1904) (quoting Turpin v. Brannon, 14 S.C.L. 261, 3 McCord 261, 267 (Ct. App. 1825)).

125. *Bundy*, 412 S.C. at 312, 772 S.E.2d at 174.

126. 12 S.C. JUR. *Easements* § 10.

127. *Bundy*, 412 S.C. at 305, 772 S.E.2d at 170 (quoting GUSTAFSON, *supra* note 48, § 39).

which the easement runs, any adverse possession on the part of owner of the servient estate is futile because there is no title to divest.[128] Therefore, to terminate an easement by prescription by the owner of the servient estate, "[the adverse use] must last for the prescriptive period, which is generally the same period required for creating an easement by prescription."[129] However, in South Carolina, *Pettis*,[130] *Bowen*,[131] and *Cuthbert*[132] all allow for the shorter period required for adverse possession to apply in cases involving termination by prescription. Although all of these cases are from the nineteenth century, these cases represent the current standard in South Carolina. Therefore, it appears that an easement may be terminated by ten years of prescriptive use in South Carolina.[133] Nationally, it appears that the current majority approach is to require the same period of use to terminate an easement through prescription as is required to acquire an easement through prescription.[134]

Should South Carolina adopt the majority approach and require twenty years of adverse use by the owner of the servient estate, it would be impossible for the easement to have terminated by prescription during the period from 1969 to 1985, which was only sixteen years. However, even under the shorter ten-year requirement, as provided by the adverse possession statute,[135] there was still insufficient evidence to show a termination by prescription. Since Mr. Bundy would be the one asserting that the easement had terminated, he would have the burden of proving each element of prescription during this period.[136] However, the Bundy opinion suggests that neither party presented any evidence relating to the use of the

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128. *See id.*

129. BRUCE & ELY, *supra* note 31, § 10:25 ("An easement terminated by the servient estate owner's adverse use or possession of the easement area for the period of prescription."); *see also* RESTATEMENT (FIRST) OF PROP.: PRESCRIPTION § 506 cmt. E (AM. LAW INST. 1944) ("The period of prescription for the extinguishment of an easement is the same as the period of prescription fixed by local law for obtaining easements.").

130. State v. Pettis, 41 S.C.L. 390, 7 Rich. 390 (Ct. App. 1854).

131. Bowen v. Team, 40 S.C.L. 298, 6 Rich. 298 (Ct. App. 1853).

132. Cuthbert v. Lawton, 14 S.C.L. 194, 3 McCord 194 (Ct. App. 1825).

133. 12 S.C. JUR. *Easements* § 33 (citing S.C. CODE ANN. § 15-67-210 (2012)).

134. See BRUCE & ELY, *supra* note 31, § 10:25; RESTATEMENT (FIRST) OF PROP.: PRESCRIPTION § 506 cmt. E (AM. LAW INST. 1944) ("The period of prescription fixed by local law for obtaining easements.").

135. S.C. CODE ANN. § 15-67-210 (2012).

136. *Compare* BRUCE & ELY, *supra* note 31, § 10:25 ("In order for an easement to be extinguished by prescription, the servient owner's use or possession must satisfy the same elements required for obtaining an easement by prescription."), *with* Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("The party claiming a prescriptive easement has the burden of proving all elements.").

disputed road from 1969 to 1985.[137] Therefore, without additional evidence, it cannot be held that the easement terminated by prescription.

b. What is Required to Establish the Abandonment of an Easement?

Similar to termination by prescription, "[t]he burden of proof is upon the party asserting abandonment to show the abandonment by clear and unequivocable evidence."[138] The determination of whether an easement has been abandoned is "a factual question in an action at law."[139] This analysis is centered on the intention of the owner of the easement to abandon.[140] Further, "[t]he intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case."[141] However, such an inference may only be made where, "the acts and conduct of the owner and the nature and situation of the property, where there appears some clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence."[142]

Within this context, South Carolina courts have repeatedly held, "[m]ere nonuse of an easement created by deed will not amount to an abandonment."[143] However, the law in South Carolina appears unsettled regarding whether nonuse alone is enough to constitute abandonment of an easement that was not created by a deed, such as a prescriptive easement. Nationally, the general rule is that mere nonuse is not enough to constitute abandonment, regardless of whether the easement was created by a deed or

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137. Bundy v. Shirley, 412 S.C. 292, 313, 772 S.E.2d 163, 174 (2015).

138. Rhett v. Gray, 401 S.C. 478, 491, 736 S.E.2d 873, 880 (Ct. App. 2013) (quoting Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975)); *see also* Judy v. Kennedy, 398 S.C. 471, 479, 728 S.E.2d 484, 488 (Ct. App. 2012) (providing that the burden is a "high one").

139. *Rhett*, 401 S.C. at 491, 736 S.E.2d at 880 (quoting Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998)).

140. *Id.* (citing *Carolina Land Co.*, 265 S.C. at 109, 217 S.E.2d at 21 (1975)).

141. *Carolina Land Co.*, 265 S.C. at 109, 217 S.E.2d at 21.

142. *Id.* (citing Hodge v. Manning, 241 S.C. 142, 151, 127 S.E.2d 341, 345 (1962)).

143. *Rhett*, 401 S.C. at 491, 736 S.E.2d at 880 (citing Witt v. Poole, 182 S.C. 110, 115, 188 S.E. 496, 498 (1936)); *see also Carolina Land Co.*, 265 S.C. at 109, 217 S.E.2d at 21 (citing *Witt*, 182 S.C. at 110, 188 S.E. at 496) ("[M]ere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence."); *Judy*, 398 S.C. at 479, 728 S.E.2d at 488 (citing *Witt*, 182 S.C. at 115, 188 S.E. at 499) ("That burden [of proving abandonment] is a high one that cannot be satisfied by mere nonuse.").

not.[144] Many jurisdictions have provided an express exception for prescriptive easements where nonuse for the period of prescription does constitute an abandonment of the easement,[145] while others have provided that such a period of nonuse creates a rebuttable presumption of abandonment.[146]

Although South Carolina has been identified as one of the states that provides that nonuse of a prescriptive easement for the prescriptive period constitutes abandonment, this is predicated solely on an 1848 case.[147] Furthermore, in this 1848 case, the judge expressly provided that, "I am unaware of any fixed time by the law, for supposing the abandonment of such a right; although, by analogy, it may be supposed to be twenty years or more."[148] Although the judge in *Parkins* quoted a Massachusetts case that provided that a period of nonuse for twenty years would create a presumption that the easement was terminated, the judge immediately provided that, "I would not venture therefore to fix any time for proving, by a non-user, the abandonment of such an easement."[149] Instead, the judge provided that determination of whether an easement has been abandoned "is a question of *intention*, for the jury."[150] By refusing to set a firm time period in which nonuse can constitute abandonment and also suggesting that the jury must always look at the intent of the easement holder, this case actually appears to follow the majority approach that mere nonuse is not enough to constitute abandonment.

In *Bundy*, the court provided that, "there is no evidence of the use of the easement from 1969, when Mr. Shirley alleged the easement was perfected,

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144. BRUCE & ELY, *supra* note 31, § 10:19 ("Nonuse of an easement, even for a prolonged period, generally does not in and of itself amount to abandonment.").

145. *Id.*; *see, e.g.*, Andrews v. Hatten, 794 So. 2d 1184, 1188 (Ala. Civ. App. 2001); Johnston v. Verboon, 598 S.W.2d 752, 754 (Ark. 1980); Chevy Chase Land Co. v. U.S., 733 A.2d 1055, 1082 n.8 (Md. 1999); McDonald v. Sargent, 13 N.W.2d 843, 844 (Mich. 1944); Cronk v. Tait, 719 N.Y.S.2d 386, 387 (N.Y. App. Div. 2001); Shippy v. Hollopeter, 304 N.W.2d 118, 121 (S.D. 1981).

146. BRUCE & ELY, *supra* note 31, § 10:19; Sally Brown Richardson, *Nonuse and Easements: Creating A Pliability Regime of Private Eminent Domain*, 78 TENN. L. REV. 1, n. 87 (2010) ("The jurisdictions that have adopted this exception include: Arizona, Arkansas, California, Guam, Maine, Michigan, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wisconsin.").

147. Jennifer L. Romeo, *Loss of Private Easements by Nonuse*, 62 A.L.R. 5th 219 (1998) (citing Parkins v. Dunham, 34 S.C.L. 224, 3 Strob 224, 228 (S.C. App. L. 1848)) ("The following courts have applied the rule that an easement established by prescription is lost by mere nonuse for the same period as was required to establish it, regardless of the easement holder's intent."); Richardson, *supra* note 146, at n.87 (citing Parkins, 34 S.C.L. at 228).

148. *Parkins*, 34 S.C.L. at 228.

149. *Id.*

150. *Id.*

and 1985, the time Mr. Shirley's parents purchased the property."[151] Even assuming that South Carolina does follow the more lenient standard, where mere nonuse for the prescriptive period is sufficient, there would still be insufficient evidence to find abandonment. First, this period of unknown use was only 16 years. No jurisdiction has held that nonuse for a period less than the prescriptive period, without more, is sufficient to constitute abandonment. Second, Mr. Bundy would bear the burden of showing abandonment through clear and convincing evidence.[152] Therefore, it is only significant that Mr. Bundy presented no evidence regarding the use of the disputed road from 1969 to 1985. Even if Mr. Bundy were able to present evidence that definitively showed nonuse during this period, he would still be tasked with presenting additional evidence of acts by the dominant estate owner that either showed intent to abandon the easement or were inconsistent with its continued existence.[153]

IV. CONCLUSION

Admittedly, the facts and evidence of *Bundy* are particularly unique. It is rare that an owner of property will be unable to present any evidence regarding the use of his property by his immediate predecessors in title. It is even more unlikely that that same owner would be able to present extensive evidence regarding the use of the property from the predecessor in title whose ownership began fifty-eight years prior to the commencement of the action. The situation was further complicated by Mr. Shirley's choice to rely extensively on a sparse 1825 opinion.

However, relying on the traditional principles regarding easements helps to sort through these unique complexities. By looking first at whether or not the easement created was appurtenant or in gross and then determining if the easement had terminated prior to Mr. Shirley obtaining title to the dominant estate, it becomes apparent that *Cuthbert* started with the presumption that an easement is perpetual and irrevocable and then held that the owner of the servient estate may terminate this easement through adverse possession for the statutory period at the time.

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151. Bundy v. Shirley, 412 S.C. 292, 313, 772 S.E.2d 163, 174 (2015).

152. Rhett v. Gray, 401 S.C. 478, 491, 736 S.E.2d 873, 880 (Ct. App. 2013) (quoting Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975)). *See also* Judy v. Kennedy, 398 S.C. 471, 479, 728 S.E.2d 484, 488 (Ct. App. 2012) (providing that this burden is a "high one").

153. *Carolina Land Co.*, 265 S.C. at 109, 217 S.E.2d at 21 (citing Hodge v. Manning, 241 S.C. 142, 151, 127 S.E.2d 341, 345 (1962)).

Much of the blame likely lies with Mr. Shirley for basing his claim so heavily on a single, seemingly outdated case. However, the unnecessary creation of this additional continual use element has the potential to significantly impact future individuals seeking to claim, or maintain their claim to, a prescriptive easement. Although the exact facts of this case are unlikely to arise again, the imposition of this continual use element places all prescriptive easements, present and future, in a state of perpetual uncertainty.

The elements of prescriptive easement have been carefully crafted over centuries in order to balance these interests. Further, South Carolina already provides additional protection to property owners from having their property unnecessarily burdened by easements. While most jurisdictions presume that an easement is appurtenant unless shown otherwise, South Carolina requires that an easement satisfy all elements, including that it be essentially necessary and have a terminus on the property.[154] This standard applies regardless of the intents of the parties.[155] Although the South Carolina courts have recited that the courts prefer appurtenant easements, the stringent adherence to these elements effectively shifts the preference in South Carolina to easements in gross. Compared to jurisdictions nationally, South Carolina appears to be the only state that has taken this step.[156] It is excessive to construct yet another substantial barrier preventing the transfer or assignment of prescriptive easements.

"An easement established by prescription stands in all respects on the same footing as an easement acquired by grant."[157] Although some jurisdictions have shown willingness to treat prescriptive easements as slightly inferior by allowing nonuse for the prescriptive period to constitute abandonment, such nonuse must still last for the entire prescriptive period.[158] Although it is questionable whether South Carolina courts have been willing to adopt this minor carve out, the continual use element essentially abrogates this standard. Any period of nonuse, no matter how short it may be, will cut off any subsequent claimants that seek to "tack" to an earlier use. Equally significantly, the burden of refuting this nonuse is placed on the party

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154. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965).

155. *See, e.g.*, BRUCE & ELY, *supra* note 31, § 2:3 n. 12 (citing Tupper v. Dorchester Cty, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997)) ("In contrast [to the presumption that an easement is appurtenant], the Supreme Court of South Carolina has taken the position that an appurtenant easement must be "essentially necessary" to the enjoyment of a dominant estate, and that an easement will be treated as one in gross unless this element can be shown.").

156. *See id.*

157. GUSTAFSON, *supra* note 48, § 35 (citing Nat'l Prop. Corp. v. Polk County, 386 N.W.2d 98 (Iowa 1986); Rutland v. Stewart, 630 So. 2d 996 (Miss. 1994).

158. BRUCE & ELY, *supra* note 31, § 10:19.

claiming a right to the prescriptive easement. This is a complete reversal of the long-settled rule that the party asserting that a termination has occurred bears the burden of proof.[159] This places far too great of a burden on the owner of the dominant estate, who must always be prepared to account for the continual use of the prescriptive easement, even after the use has been continuous and uninterrupted for the prescriptive period.

The court's creative application of continual use and tacking simply does not comply with the law regarding prescriptive easements in South Carolina. Its holding has the potential to be much more harmful than the court dropping a comma in the third element of prescriptive easements in *Steele*.[160] Rather than waiting decades while these new principles gain traction, the holding should be expressly limited to the exact facts of the *Bundy* case.

159. *See, e.g.*, Rhett v. Gray, 401 S.C. 478, 491, 736 S.E.2d 873, 880 (Ct. App. 2013) (citing Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975)) ("The burden of proof is upon the party asserting abandonment to show the abandonment by clear and unequivocable evidence.").

160. Simmons v. Berkeley Elec. Coop., No. 2013-001477, 2016 WL 6520167, at *3 (citing Steele v. Williams, 204 S.C. 124, 133, 28 S.E.2d 644, 648 (1944)).